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No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ANTHONY HERBERT,
Petitioner,

v.

BARRY LANDO, MIKE WALLACE,
COLUMBIA BROADCASTING SYSTEM, INC., and
ATLANTIC MONTHLY COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DANIEL J. POPEO *
MICHAEL P. MCDONALD
AMERICAN LEGAL FOUNDATION
1705 N Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 857-0400

* Counsel of Record

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WILSON · EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly held that specific defamatory falsehoods that may have been made with actual malice should not be actionable if they are "subsidiary" to "larger" libels that have been found to be nonactionable under that same standard of proof.

2. Whether the First Amendment prohibits a libel action based upon the particular defamatory meanings conveyed by a publication as a whole, as distinguished from specific individual statements contained in the publication.

PARTIES

All parties are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Anthony Herbert, respectfully prays that a writ of certiortari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit entered in this defamation action on January 15, 1986.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported at 781 F.2d 298 (2d Cir. 1986). It is reprinted as Appendix A to this petition at 1a-27a.

Two opinions by the United States District Court for the Southern District of New York issued in this proceed-

ing. The first, in which motions for summary judgment were granted in part and denied in part, was decided on October 10, 1984, and is reported at 596 F. Supp. 1178. It is reprinted as Appendix B to this petition at 28a-132a. The second, in which motions for reargument were denied, was decided on February 27, 1985 and is reported at 603 F. Supp. 983. It appears as Appendix C to this petition at 133a-149a.[1]

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit entering summary judgment against petitioner on all claims was entered on January 15, 1986. This petition for certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. FIRST AMENDMENT, UNITED STATES CONSTITUTION:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

2. FOURTEENTH AMENDMENT, SECTION 1, UNITED STATES CONSTITUTION:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

This is a defamation action brought by Anthony Herbert, petitioner herein, against Columbia Broadcasting System, Inc., producer Barry Lando, and correspondent Mike Wallace (hereafter generally referred to as

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[1] Appendices A, B, C are not found in this petition but in a separately prepared volume that accompanies it captioned "Appendices to Petition for Writ of Certiorari."

"CBS") and the Atlantic Monthly Company, publisher of the *Atlantic* magazine.

The Parties

Petitioner is a retired Army officer. He received widespread media attention following a tour of duty in Vietnam in 1968-69 when he accused his superior officers of covering up war crimes, and of relieving him from his combat command after he had reported such crimes. App. A at 3a-4a. Petitioner is the author of a book, *Soldier*, which recounts his Vietnam experiences and is critical of the Army for its treatment of him there.

Respondents Barry Lando, Mike Wallace, and Columbia Broadcasting System, Inc. ("CBS") jointly worked to produce a television report on petitioner and the veracity his war crime accusations. This report was broadcast by CBS as part of its weekly '60 Minutes" television program on February 4, 1973. Respondent Lando researched the program which was titled "The Selling of Col. Herbert." Respondent Wallace narrated the report, and also participated with Lando in preliminary interviewing and editing. App. A at 4a-5a.

Using information garnered from his participation in the preparation of the CBS broadcast, Lando subsequently wrote a magazine article published by the *Atlantic Monthly* on this same topic. It was titled "The Herbert Affair" and appeared in the May, 1973 issue of the *Atlantic*. App. A at 6a.

Content Of The CBS "60 Minutes" Program And Atlantic Article [2]

The CBS program at issue claimed to be an investigative review of petitioner's attempt to report war crimes and his subsequent treatment by the Army as these facts had become known to the public through the media. The

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[2] For an extensive review of the genesis and contents of the CBS telecast and *Atlantic* article see App. B at 39a-57a.

program included film clips of Herbert's television appearances as well as portions of filmed interviews conducted by both Wallace and Lando. App. A at 5a.

Herbert's superiors in Vietnam were General John Barnes and Colonel J. Ross Franklin. In the course of the CBS presentation, both Barnes and Franklin were shown denying that they ever had received reports from Herbert about war crimes and atrocities. Moreover, individuals cited by Herbert in his book as supporting his claims were also shown denying the accuracy of Herbert's charges. *Id.* Some went even further, stating that Herbert himself could be capable of certain acts of brutality. *Id.* The program *in toto* may be fairly characterized as a defamatory attack upon petitioner's honesty and integrity.

After the CBS "60 Minutes" program was televised, Lando wrote a story about his investigation into petitioner's war crime charges which was sold to the *Atlantic*, a monthly magazine. App. A at 6a. The editors at the *Atlantic* added a preface to Lando's piece which summarized his past involvement with Herbert and the "60 Minutes" broadcast. The Lando article, in general, discussed how Lando had become progressively disillusioned with Herbert as the CBS "60 Minutes" investigation progressed and the "true" facts regarding Herbert's claims were revealed. *Id.* Both the article's overall portrait of petitioner and its conclusions were similarly defamatory to petitioner's reputation.

Litigation History

Petitioner sued for libel on January 25, 1974. He claimed that both the CBS broadcast and the *Atlantic* article contained specific factual inaccuracies that were false, defamatory and made with actual malice. Petitioner also alleged that both publications defamed him when viewed as a whole distinct from any specific statements they may have contained. App. A at 7a; App. B 29a-30a.

Discovery thereafter ensued for a period of approximately one year. However as a result of a dispute over the permissible scope of petitioner's inquiry into CBS' "editorial processes"—a dispute eventually resolved by this Court—discovery was not completed until 1982.[3] At that point in the litigation all defendants moved for summary judgment.

The District Court Decision

The United States District Court for the Southern District of New York granted partial summary judgment for CBS and a complete dismissal of the action against the *Atlantic* magazine on October 10, 1984. App. B at 28a; 121a-123a. Specifically, of eleven discrete statements culled from both the CBS broadcast and the *Atlantic* article that petitioner claimed were actionable, Judge Haight ruled that sufficient evidence of actual malice existed only as to two statements.[4] *Id.* Accordingly he held that a jury trial involving Lando, Wallace and CBS in respect of these statements was required. App. B at 122a.

The first statement deemed actionable was written by Lando for his piece in the *Atlantic.* It reads in its entirety as follows:

> Herbert had also claimed that one of the brigade's top enlisted men, Sergeant Major John Bittorie, had been listening in an outer office when Herbert reported to Colonel Franklin an incident of water tor-

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[3] See *Herbert v. Lando*, 73 F.R.D. 387 (S.D.N.Y. 1977), *rev'd*, 568 F.2d 974 (2nd Cir. 1977), *rev'd and remanded*, 441 U.S. 153 (1979).

[4] A comprehensive listing of each of the eleven statements petitioner asserted were actionable may be found in the Appendix to the Court of Appeals decision, App. A at 25a-27a. Petitioner's claim, asserted both in his complaint and in his brief in opposition to summary judgment, that the specific overall impact of the publications could serve as a separate basis for his defamation action was not considered by Judge Haight until the motions for reargument were heard. App. C at 134a; *infra* at 7-8.

> ture. When the Army CID questioned him, Bittorie denied Herbert's claim. Herbert told me the reason was that although Bittorie himself was retired, he still had two sons in the service and had to worry about their careers. But when I flew to Columbus, Georgia, to interview Bittorie, he again denied having overheard any such report. What about his sons who are in the Army? *He had no sons.* (Emphasis added).

App. B at 90a.

In response to this allegedly false and defamatory statement, petitioner had produced an affidavit executed by Bittorie which recited that he had informed Lando prior to the appearance of this article that he was the father of both a son and daughter and that the son had indeed been in the Army at the time in question. In light of this evidence Judge Haight reasoned:

> . . . it is clear that if the jury accepts Bittorie's account, it could also find upon clear and convincing evidence that Lando published in the *Atlantic Monthly* a false statement, defamatory to Herbert, and with knowledge of falsity. The statement "Bittorie had no sons" is defamatory of Herbert because, in the context in which the statement is made, it accuses Herbert of having lied to Lando.

App. B at 91a.

The second statement challenged by petitioner that Judge Haight ruled actionable was made by Mike Wallace in the CBS "60 Minutes" broadcast. Wallace asserted:

> We have spoken with many men who saw Herbert after his relief in Vietnam. . . to a man they say that Herbert never once said to them that he had been relieved because he had tried to push war crimes charges.

App. B at 101a.

In response to this charge, petitioner had submitted the affidavit of one individual, a helicopter pilot named Kahila, who had been interviewed by Lando prior to the broadcast. Kahila stated that he had in fact told Lando that Herbert had spoken to him on this very subject after his relief. App. B at 103a. Viewing this affidavit as creating a second genuine issue of credibility, Judge Haight ruled the statement actionable:

> If a jury accepts such testimony [from Kahila] and rejects Lando's contentions that either Kahila did not say that or Lando innocently misunderstood him, then a trial jury could find with the requisite degree of certainty that the quoted statement was false, defamatory, and made with actual malice.

App. B at 105a.

In addition to the eleven specific statements taken from both the broadcast and article, petitioner also asserted that a number of specific defamatory meanings were conveyed by the publication as a whole. App. B at 29a-30a. This argument was considered and dismissed by Judge Haight in a separate opinion that was issued on February 27, 1985. App. C at 137a-149a.

Defamations petitioner claimed were generated by both publications as a whole were specified to be that: (1) petitioner had failed to report war crimes while serving with the 173d Brigade; (2) petitioner had made no effort to report war crimes until after My Lai was in the news; (3) during the My Lai publicity, petitioner fabricated the war crimes reason for his relief from command to explain away other reasons for his being relieved; (4) the Army investigation was thorough and found no support for Herbert's charges; (5) petitioner was a brutal man in his treatment of POWs and in condoning brutality against the Vietnamese; (6) petitioner lied about reporting war crimes, his own conduct in Vietnam and his concern about war crimes. App. B at 29a-30a; *see also* App. A at 14a, n.5.

However the district court believed that First Amendment considerations precluded it from considering petitioner's claim that defamation liability could be predicated upon the CBS broadcast report and the *Atlantic* magazine article viewed as a whole, in addition to any specific statements alleged to have been made with actual malice. App. C at 143a-144a. Relying primarily upon a Ninth Circuit opinion, *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), the court held: "There are [First Amendment] policy reasons for requiring specific pleadings in [defamation] cases of this nature." App. C at 143a. For this reason, it rejected petitioner's "overall impact" theory of liability terming it "a less demanding approach [to imposing liability] which constitutional principles reject." App. C at 148a. *See also*, App. C at 147a:

> The media, protected by the First Amendment, and the Court, charged *inter alia* with its enforcement, are entitled to be directed by the public figure plaintiff to specific statements which are defamatory, false . . . and . . . published with actual malice.

The Court of Appeals' Decision

The Court of Appeals affirmed the district court's grant of summary judgment with respect to nine of the eleven asserted defamatory statements. App. A 8a-12a. It further affirmed the lower court's conclusion that the "overall impact" of the CBS broadcast could not be a separately actionable basis for petitioner's suit. App. B at 12a-15a. But although Judge Kaufman, who wrote the opinion for the appeals court, went out of his way to praise the district judge's decision as "thoroughly reasoned," "scholarly" and "meticulous," he could not accept its conclusion that two of the eleven proffered statements were actionable. App. A at 2a; 3a. He therefore reversed the lower court's denial of summary judgment as to these remaining statements thereby effectively dismissing petitioner's entire complaint. App. A at 17a.

In determining whether these two statements were actionable, it is important to emphasize that Judge Kaufman did not reverse or even contest the district court's finding that state of mind issues of credibility were raised by each statement that would normally be resolved by the jury. He simply noted and ignored it. App. A at 18a; 19a. The fact that petitioner was both ready and able to proffer testimony to a jury from which it could find that these two statements were false, defamatory and made with actual malice was irrelevant to Judge Kaufman's disposition of these claims. The reason for this was the novel constitutional privilege he outlined for rendering otherwise actionable statements nonactionable: his "subsidiary libel" doctrine.[5]

The Subsidiary Libel Doctrine

Judge Kaufman's articulation of his subsidiary libel doctrine proceeded in two stages. He began by focusing on the nine statements dismissed by Judge Haight as nonactionable because there was insufficient evidence to prove that they had been made actual malice. App. A at 21a. Because Herbert could not prove to the court's satisfaction that these statements had been made with actual malice—although he vigorously maintained throughout the course of this litigation that they were actionable under this standard—and in light of other evidence tending to suggest that CBS had in fact believed in the veracity of these statements, Judge Kaufman asserted that CBS, Lando and Wallace:

> could not be said to have actual malice in publishing their view that (1) Herbert lied about reporting war crimes to his superiors in Vietnam, and (2) Herbert's relief from command must therefore have been for other reasons [than those alleged].

App. A at 21a.

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[5] That this doctrine is truly "novel" is attested to by the fact that *no* cases from this or any other court were cited by Judge Kaufman to support its creation. App. A at 21a-24a.

Having demonstrated that "these larger views," App. A at 22a, were nonactionable, Judge Kaufman next asked whether it was proper to allow Herbert to base his defamation action solely on inaccuracies that he characterized as being "subsidiary" to them, i.e., the two statements Judge Haight had found to be actionable. App. A at 22a. He concluded that it was not.

Thus, for example, although Judge Kaufman recognized that the statement "Bittorie had no sons," "strengthened Lando's portrayal of Herbert as a man who lied about reporting war crimes," *id.*, he stated that this was "merely a subsidiary matter to the primary, nonactionable issue—whether Herbert lied about reporting war crimes." *Id.* Because Herbert could not establish with convincing clarity that the latter, "larger" statement had been made with actual malice, the former, "subsidiary" statement was deemed nonactionable. *Id.*

The second statement Judge Haight stated was actionable—Wallace's assertion that "to a man," those who spoke with CBS said that Herbert had never been relieved for reporting war crimes—was similarly dealt with. Although Judge Kaufman recognized the clear defamatory impact of the statement and the possibility that petitioner might conceivably demonstrate to a jury that it had been broadcast with actual malice, he opined that:

> The only potentially defamatory inference that could be drawn from Wallace's statement is that Herbert was relieved of command for reasons other than reporting war crimes. But we have already held this [larger statement] to be nonactionable.

App. A at 22a-23a.[6]

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[6] To reiterate, these "larger" statements were deemed nonactionable not because petitioner conceded their accuracy, which he never did, but because he was incapable in the court's eyes of proving with convincing clarity that they had been published with actual malice.

Succinctly stated, Judge Kaufman defined his unprecedented subsidiary libel doctrine as follows:

> [W]e hold . . . that [some] statements—*even those that might be found to have been made with actual malice*—should not be actionable if they merely imply the same view and are simply an outgrowth of and subsidiary to those [defamation] claims upon which it has been held there can be no recovery.

App. A at 23a (emphasis added). No guidance was offered as to how federal judges were henceforth to distinguish "primary" from "subsidiary" statements of fact and no apparent limits were placed upon the right of the press to disseminate "subsidiary" falsehoods with actual malice.

Perhaps unsurprisingly, after setting forth this unbridled constitutional privilege Judge Kaufman immediately felt it necessary to assert that he was *not* giving defamation defendants a license "to freely embellish their stories with falsehoods while remaining free from liability." *Id.*

REASONS FOR GRANTING THE WRIT

1. The Second Circuit has promulgated the novel constitutional rule that a defamatory factual statement should not be actionable if it is merely "subsidiary" to a "larger" falsehood which is incapable of disproof. In so holding, the Court of Appeals expressly declared that it is completely irrelevant for purposes of this rule whether or not a jury might find the "subsidiary" lie to have been published with actual malice. The Court of Appeals "subsidiary libel" doctrine would therefore grant an absolute immunity to knowing or reckless lies. For this reason it stands in direct and open conflict with past libel decisions of this Court admitting of no exception to the requirement that *all* defamatory falsehoods made with constitutional malice are actionable. Allowing libel defendants to escape even the most minimal liability for pub-

lishing calculated, albeit "subsidiary," lies furthers no significant First Amendment values. Moreover it is impossible to envision how federal judges are to define, let alone restrict, the constitutional parameters of a "subsidiary" libel with any sort of certainty or predictability.

2. The particular defamatory meaning conveyed by the overall import of a publication should constitute a separate actionable basis for defamation liability in addition to any particular defamatory statements appearing therein. Although this Court has yet to address this regularly recurring federal issue, the courts below dismissed petitioner's overall impact claim on the grounds, *inter alia*, that the First Amendment precludes anything other than specific statements in a publication from being actionable in a libel suit. This overly expansive reading of the First Amendment's protections not only conflicts with the holdings of other federal courts but also unreasonably constricts the legitimate reputational interests of all libel plaintiffs.

3. Petitioner's case was dismissed on defendants' motions for summary judgment where all of his asserted claims were evaluated under the purported constitutional standard of whether a reasonable jury could find the existence of actual malice "with convincing clarity." However, whether the clear and convincing evidence standard is indeed required at the summary judgment stage will only be decided later this term in the *Liberty Lobby v. Anderson* case. Because the decision that issues in the *Liberty Lobby* case will affect petitioner's substantive rights, certiorari should be granted and this case should be held over until such time as the *Liberty Lobby* case is decided.

ARGUMENT

I. THE SECOND CIRCUIT'S NOVEL SUBSIDIARY LIBEL DOCTRINE DIRECTLY CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT ADMITTING OF NO EXCEPTION TO THE RULE THAT ALL DEFAMATORY STATEMENTS MADE WITH ACTUAL MALICE ARE ACTIONABLE.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964) this Court undertook the first step to implement an entirely new system of defamation liability. Under the federal rule announced in that case, one sued for libel by a public official could no longer be punished if he had merely published a defamatory falsehood causing damage to reputation. Instead, liability was premised upon a finding of "constitutional malice" defined as publishing knowing falsehoods or in reckless disregard for the truth of the challenged statements. 376 U.S. at 280.

Viewed a different way, this Court struck a balance in the *Sullivan* case between the public's need to discuss public affairs in an uninhibited manner and the competing interest of defamed public officials in vindicating their reputations. Although the constitutional "actual malice" privilege to defame a public official was deliberately made difficult, it was designed to be conditional and not absolute in scope.[7]

The last two decades have witnessed a substantial expansion, modification and more detailed exposition of the federal libel scheme established in *Sullivan*. Yet one principle has remained constant throughout: regardless of the context in which they appear, defamatory falsehoods made with actual malice are actionable. Justice Bren-

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[7] In holding that defamatory falsehoods made with actual malice, i.e., calculated lies, should continue to remain actionable, this Court expressly declined to adopt the view of three Justices, Black, Douglas and Goldberg, who urged the adoption of an absolute privilege to defame public officials. 376 U.S. at 293-303.

nan explained the policy reasons for placing such a limitation on speech of this nature early in the Court's development of this rule:

> Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public figure, should enjoy a like immunity. . . . Calculated falsehood falls into that class of utterances which are "no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." Hence, the knowing false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (citation omitted).

Thus, when this Court broadened the scope of the constitutional privilege to encompass "public figures" and even, for a short while, "issues of general or public concern," it always maintained that knowing or reckless falsehoods must remain actionable. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). Indeed, this Court's commitment to the rule that defamatory statements made with actual malice are afforded no immunity under the First Amendment is such that it has recently and unanimously held that even in the context of a petition to the government there is not an absolute privilege to defame. *McDonald v. Smith*, —— U.S. ——, 105 S. Ct. 2787, 2791 (1985). ("The right to petition is guaranteed; the right to commit libel with impunity is not.") *Cf. also, Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (even the weighty federal policies favoring uninhibited debate in labor disputes do not give either union or management the right to intentionally or recklessly circulate defamatory material known to be false.)

In sum, the rule that calculated or reckless lies must always remain actionable stands at the very core of *Sullivan* and its progeny. Such statements, being false, not only have "no constitutional value," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), but they actively undermine "the premises of democratic government." *Garrison*, 379 U.S. at 75.[8] Yet it is precisely this basic requirement that the Court of Appeals has seen fit to ignore. In place of the scrupulous balance of competing constitutional concerns that this Court has established—a balance which has always rendered knowing or reckless lies actionable—the Second Circuit has embarked upon a new doctrinal theory that would allow the press to disseminate defamatory falsehoods about public figure *with actual malice* and yet completely escape all liability. The mechanism of escape is its newly invented "subsidiary libel" doctrine.

As described by Judge Kaufman, the subsidiary libel doctrine would bar a libel plaintiff[9] from maintaining a cause of action whenever falsehoods are published about him that are an outgrowth of "larger" untruths that are incapable of disproof given the applicable standard of lia-

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[8] Moreover, even in the context of a public figure libel action there is the countervailing consideration that a valuable, even if reduced, reputational interest is at stake:

> The individual's right to the protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."

Gertz, 418 U.S. at 341, *quoting Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). *See also, St. Amant v. Thompson*, 390 U.S. 727, 734 (1968) (Fortas, J., dissenting). (Although "[t]he public official should be subject to severe scrutiny and to free and open criticism," if defamed with actual malice "he should have a remedy in law.")

[9] Although petitioner is a public figure, Judge Kaufman's sweeping doctrine could just as easily be employed in the context of a private figure libel plaintiff facing a negligence standard.

bility. This is so even if these "subsidiary" lies, in Judge Kaufman's own words, "might be found [by a jury] to have been published with actual malice." App. A at 23a. But the Court of Appeals' novel constitutional doctrine proves to be too much. It explicitly affords the ultimate in constitutional protection—an absolute privilege—to speech that is of no constitutional value whatsoever: the calculated lie.[10] This is such a direct and flagrant disregard of the decisional law of this Court as almost to warrant summary reversal.

But even if the subsidiary libel doctrine announced below could, through fast expository footwork, be somehow reconciled with the relevant case law (a daunting feat not even attempted by Judge Kaufman who cites *no* precedent to support his rationale) there is simply nothing to be said for allowing such a dangerous theory to go unreviewed and unchallenged.[11]

One may begin by noting the definitional ambiguities inherent in the very notion of a "subsidiary" libel. Judge Kaufman provides no clear guidelines for separating out actionable, but "non-subsidiary" statements from "larger" nonactionable statements. And, in truth, it appears as though no precise or predictable test is possible since it would turn upon an inherently subjective evaluation of the interrelatedness of one fact to another.[12]

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[10] In *Dun & Bradstreet v. Greenmoss Builders*, —— U.S. ——, 105 S. Ct. 2939 (1985) this Court reasserted the notion that there is a hierarchy to various types of speech and that the amount of constitutional protection afforded speech varies according to how directly the speech at issue bears upon "matters of public concern." In this sense, speech made with actual malice has a negative constitutional value. *Id.*, 105 S. Ct. at 2951 (White, J., concurring).

[11] This is particularly so in light of the high proportion of libel actions brought in the Second Circuit against publishers having as their principal place of business New York City.

[12] Federal courts have repeatedly demonstrated the inherent difficulties of distinguishing protected opinion from actionable fact.

Secondly, Judge Kaufman offers no cogent rationale to explain why a discrete defamatory falsehood made with actual malice should be deemed nonactionable simply because it is an outgrowth of a larger nonactionable defamation. Suppose, for example, that a newspaper were to publish an editorial stating that based upon its overall impressions of a certain judge's conduct over the past year it believed that judge to be a racist. Then suppose the editorial offered a specific factual example to support its view. In a very real sense the specific example of allegedly racist conduct may be viewed as an outgrowth of the larger protected opinion based upon the paper's overall monitoring of the judge's performance. But if that statement of fact is false and the judge sues, why should it not be actionable if proof of actual malice is available? In short, the legal alchemy Judge Kaufman employs to transmute an otherwise actionable fact into a nonactionable "subsidiary" fact is incapable of reasoned explanation.

More to the point, so-called "subsidiary" libels have repeatedly been held to be actionable by other federal courts. For example, in *Westmoreland v. CBS*, 596 F. Supp. 1170 (S.D.N.Y. 1984) the district court conceded that there was a great deal of evidence to support the defendants' overall belief that General Westmoreland had led a conspiracy to suppress intelligence about the size of the enemy force in Vietnam. Despite the fact that this "large" view was arguably nonactionable, the court held that specific subsidiary statements in the CBS program at issue in that case were actionable and required a trial:

See e.g., Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2662 (1985). Yet there is a compelling interest for undertaking such an arduous task, *viz.*, "[u]nder the First Amendment there is no such thing as a false idea." *Gertz*, 418 U.S. at 339. Here, by contrast, we are dealing with the ambiguous concept of "primary" and "subsidiary" *facts*, not opinions. Accordingly, there is no similarly compelling reason for judges to make such subjective determinations.

> Although a reporter may have sufficient evidence of his charge to foreclose any material issue of constitutional malice for its publication, he may nonetheless make himself liable if he knowingly or recklessly misstates th[e] ["subsidiary"] evidence to make it seem more convincing or condemnatory than it is.

Id. at 1174. Assuming *arguendo* Judge Kaufman is correct and that in the instant proceeding the "primary" libels uttered by CBS are nonactionable, petitioner is still entitled to go to trial if, as the district court found, there is evidence to show "actual malice" in CBS' presentation of specific factual charges that injured his reputation.

Lastly, it hardly needs emphasizing how the subsidiary libel doctrine could be used to sanction malicious character assassination so long as a defendant was always careful to include a variety of "larger" unprovable lies in his attack. The very likelihood that such will occur is undoubtedly what led Judge Kaufman to warn that he did not intend "to permit defamation defendants to freely embellish their stories with falsehoods while remaining free from liability." App. A at 23a.

In sum, Judge Kaufman's doctrine is an open challenge to the principle of *stare decisis*. It would be unworkable in practice and would result in the dismissal of meritorious libel suits such as petitioner's. For all these reasons the Court should grant this petition to review the novel and dangerous doctrine promulgated below.

II. THE DECISION BELOW PRESENTS AN IMPORTANT AND UNSETTLED QUESTION OF CONSTITUTIONAL LAW AS TO WHETHER THE PARTICULAR DEFAMATORY MEANINGS CONVEYED BY A PUBLICATION AS A WHOLE MAY BE ACTIONABLE.

This case also presents a second important federal question for review: whether the "overall impact" of a publication may constitute a separate actionable basis for

a defamation suit where particular defamatory meanings are conveyed by the publication viewed as a whole. Several federal appeals courts have adopted this position. *Infra* at 20-21. However when this claim was asserted below both courts unequivocally rejected it. App. A at 12a-15a; App. C at 146a-148a. Although this Court appears to have accepted the notion that an invasion of privacy action may be based upon the specific false impressions conveyed by a publication examined as a whole, *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974), it has yet to make a similar ruling in the libel field. Review is therefore sought to resolve this issue.

In particular, petitioner asks this Court to reconsider the district's holding that the First Amendment in some way precludes a libel action premised upon the specific libels generated by a media program or article when viewed as a whole as distinct from separate specific statements therein that are also alleged to be defamatory.[13] App. C at 143a-145a.

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[13] While the Court of Appeals affirmed the district court's dismissal of petitioner's overall impact claim, it avoided doing so on constitutional grounds. App. A at 13a-14a. Instead it asserted that allowance of this action would be "a meaningless gesture," since, in the appellate court's opinion, "the defamatory implications of the specific statements [deemed nonactionable] and the overall impact of the publications are identical." *Id.* at 14a-15a. But this distinction misses the point. Even assuming, which petitioner does not, that the evidence he has proffered as to each of the eleven specific statements in the CBS broadcast and *Atlantic* article is insufficient, viewed in isolation, to support a finding of actual malice, petitioner is claiming that the *cumulation* of all this evidence proves actual malice as to specific charges derived from the publication as a whole. In other words, petitioner claims that he doesn't need one piece of evidence which *by itself* proves actual malice as to one particular statement. Rather, the evidence can be cumulated and offered to show that publication as a whole made specific disparaging remarks that are actionable.

Moreover it is curious, to say the least, that Judge Kaufman's analysis would make both subsidiary lies nonactionable where the

The rationale articulated by the lower court to support its decision is twofold. It rests upon the fact that (1) the media enjoy "presumptive First Amendment protection" to discuss the conduct of public figures; and (2) that this protection would be reduced unless specific allegations were pleaded by a libel plaintiff. *See* App. C at 143a, *citing*, *Small v. ABC*, 10 Med. L. Rptr. 2391, 2392 (N.D. Iowa 1984); *Barger v. Playboy Enterprises, Inc.*, 564 F. Supp. 1151, 1154 (N.D. Cal. 1983) and *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076, 1082-83 (9th Cir. 1976).

In fact, however, there is nothing in the decisional law of this Court that precludes a plaintiff from basing a libel action on the overall specific impact of a publication. This is particularly so if the publication, considered in its entirety, is understood by its intended audience to impugn the plaintiff's character in several specific ways.

Thus, for example, in the analogous area of false light invasion of privacy this Court, in a nearly unanimous decision allowed a jury verdict of liability against a newspaper to stand primarily because it had published an article conveying the specific misimpression that a personal interview with one of the article's subjects had occurred. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974).

Moreover, several lower courts of appeals have allowed defamation actions to be predicated upon the overall thrust of a publication. For example, in *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978), the plaintiff contended that the specific inference which flowed from a television broadcast was actionable "even if no single remark in it

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larger, primary lies are nonactionable, *supra* at 13-18, and the larger, primary lies nonactionable where the subsidiary lies are nonactionable.

was defamatory," 576 F.2d at 497, and the Third Circuit fully considered and evaluated the claimed defamatory impression created by the program as a whole. *Id.* at 501-504. Similarly, in *Lauderback v. American Broadcasting Companies, Inc.*, 741 F.2d 193 (8th Cir.), *cert. denied*, 105 S. Ct. 961 (1984), the court considered a libel plaintiff's contention that the "broadcast, on the whole, characterized him as a crook and a liar." 741 F.2d at 195. *See also Locricchio v. Evening News Association, Inc.*, No. 64729, slip op. at 2 (Mich. Ct. App. Aug. 24, 1983), *cert. denied*, 105 S. Ct. 433 (1984) (a plaintiff need not base his libel action upon specific statements; "publication considered as a whole" may be actionable); *Janklow v. Newsweek*, 759 F.2d 644, 651 (8th Cir. 1985) (specific defamatory meaning drawn from magazine article, viewed as a whole, is actionable).

Finally, in *Hoffman v. Washington Post Co.*, 403 F. Supp. 600 (D.C. 1977), *aff'd w.o. opinion*, 578 F.2d 442 (D.C. Cir. 1978), a federal court, faced with a claim similar to that asserted herein, stated:

> . . . The Court need not determine whether these two statements, standing by themselves, are defamatory. They were not published standing by themselves. They were published in context. The court's function is to determine whether the publication *taken as a whole* is defamatory, not whether two isolated statements might not be defamatory if published by themselves. . . . The challenged publication must be read as a whole. Its content must be considered in its entirety and weighed in connection with its structure, nuances, implications, and connotations. (Emphasis added).

Id. at 602 n.1.

Thus it is abundantly apparent that the claim asserted by petitioner has merit and should not have been dismissed out of hand. Yet the question remains unsettled. If the lower court and respondents are correct that the

First Amendment precludes libel plaintiffs from basing a cause of action upon the overall impact of a publication a radical constriction of the legitimate rights of all libel plaintiffs will have occurred. Defamations previously treated as a proper basis for a libel action will have become absolutely privileged. This Court should therefore grant certiorari so that this important, but unsettled, issue of constitutional law may finally be resolved.

III. BECAUSE PROPER DISPOSITION OF PETITIONER'S CLAIMS DEPENDS, IN PART, UPON THIS COURT'S FORTHCOMING HOLDING IN *LIBERTY LOBBY v. ANDERSON*, THIS PETITION SHOULD BE HELD OVER UNTIL SUCH TIME AS THAT DECISION ISSUES.

Last term, this Court granted certiorari in *Liberty Lobby v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1983), *cert. granted*, —— U.S. ——, 105 S. Ct. 2672 (1985) (No. 84-1602). The question presented for review in that case is whether in order to deny a defendant's motion for summary judgment in a public figure libel action, the trial court judge must conclude as a matter of federal law that a reasonable jury not only could find the existence of actual malice, but could find that it had been established with "convincing clarity."

The "convincing clarity" standard at issue in *Liberty Lobby* was used by the district court judge below to weigh the sufficiency of petitioner's proof of actual malice for each of the eleven separate statements claimed to be actionable. App. B at 38a; App. C at 142a ("A reading of the Court's prior opinion makes it plain that the main focus was upon whether or not a jury could find . . . actual malice by that measurably heavier burden of 'clear and convincing evidence.' "). This occurred despite petitioner's strenuous objections to its use. *See* Brief of Appellant-Appellee Anthony Herbert in the U.S. Court of Appeals for the Second Circuit beginning

at 47. Further, it cannot be gainsaid that of the nine statements found by the district court to be nonactionable, one or more would have been allowed to go to trial had the judge not employed the convincing clarity standard at this preliminary phase of the proceeding.

For example, petitioner challenged one statement by respondent CBS to the effect that "none" of the men serving under him knew for certain that he had reported war crimes. App. B at 65a. Petitioner claimed that CBS in fact had information to the contrary prior to the broadcast. App. B at 67a. After carefully examining the charges and countercharges with respect to two individuals who had spoken to CBS and had at one time supported petitioner's claim, App. B at 67a-83a, Judge Haight concluded that because there were "elements of ambiguity and uncertainty" in their testimony, "a reasonable jury could not find *with convincing clarity* that [CBS] acted with actual malice. . . ." App. B at 83a (emphasis added). Thus, application of the "convincing clarity" standard appears decisive on this statement and others that were dismissed as well. *See e.g.*, App. B at 100a-101a ("In the case at bar, assuming *arguendo* that a trial jury accepted Herbert's denials . . . the jury could not find *by clear and convincing evidence* that the CBS defendants proceeded recklessly in publishing that account.") (emphasis added).

The district court's use of the clear and convincing standard was affirmed by the Court of Appeals. App. A at 8a. This occurred despite petitioner's renewed objections to its use and the appellate court's awareness of the pending *Liberty Lobby* case. App. A at 8a, n.2.

In short, both the trial and appellate courts believed that all of the evidence of actual malice adduced by petitioner below had to be assessed according to the constitutional "convincing clarity" standard. But this "requirement," at least insofar as it relates to the summary judgment phase of a public figure libel trial, is dubious. If

this Court were to rule in the *Liberty Lobby* case that no such requirement exists, petitioner would be entitled to have this case remanded and his claims reassessed.

This court's disposition of the *Liberty Lobby* case may affect the fair consideration of petitioner's claims in a second and less obvious way. The present procedural posture of the *Liberty Lobby* case is quite similar to that of the instant proceeding. In *Liberty Lobby*, the District of Columbia Circuit would have allowed twenty-one of thirty alleged libels to survive a motion for summary judgment and proceed to trial. Similarly the dispute in this case swirls, in part, around two of eleven alleged libels that the district court would have sent to trial. Moreover in *Liberty Lobby*, as here, the actionable statements may be viewed as "subsidiary" to "larger" libels that were incapable of disproof. This Court's decision in *Liberty Lobby* may therefore touch upon some of the issues raised herein. This likelihood is increased considering the fact that the subsidiary libel doctrine formulated by Judge Kaufman was at one point referred to as "a variation of the 'libel-proof' [plaintiff] doctrine,' " App. A at 21a, n.10, and the *Liberty Lobby* case indirectly involves that doctrine. *See Liberty Lobby v. Anderson*, 746 F.2d 1563, 1568-69.[14]

Thus, because of the substantial impact this Court's decision in the *Liberty Lobby* case is likely to have on petitioner's claims, petitioner respectfully requests that, at the least, certiorari be granted and this petition be held over until such time as a decision in that case issues. Further, if the Court rules that the clear and convincing standard is inapplicable at the summary judgment stage of a public

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[14] The defendants in *Liberty Lobby* requested this Court to review Judge Scalia's holding on the libel-proof issue in their certiorari petition, but the Court declined. This does not foreclose the possibility, however, that it may nevertheless be discussed in dicta when the Court's decision issues.

figure libel action, this Court should then order an appropriate remand.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

DANIEL J. POPEO *
MICHAEL P. MCDONALD
AMERICAN LEGAL FOUNDATION
1705 N Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 857-0400

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* Counsel of Record